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No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROY E. BLACK, G. HERBERT FEIK, EDGAR M. FLEWELLYN, ROBERT E. KEMP, EVERETT D. MILBURN, SR., WILLIAM K. STROBEL and ELMER V. YOUNG,

Petitioners,

vs.

THE ROLAND ELECTRICAL COMPANY, a corporation,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF BETHLEHEM-FAIRFIELD SHIPYARD, INCORPORATED, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND

BRIEF OF AMICUS CURIAE IN OPPOSITION.

WILLIAM L. MARBURY,
Counsel for Bethlehem-Fairfield Shipyard, Incorporated.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Bethlehem-Fairfield Shipyard, Incorporated, respectfully moves for leave to file the accompanying brief as *amicus curiae* for the following reasons:

1. The undersigned counsel for Bethlehem-Fairfield Shipyard, Incorporated, filed his petition for permission

to submit a brief and to be heard in oral argument as *amicus curiae* in the court below. This petition was granted and, after argument, the decision of the District Court was reversed on the single point argued by the undersigned counsel. It is this point which the petition for certiorari now seeks to have this Court review.

2. The petition filed below for leave to submit a brief and to be heard as *amicus curiae* is set forth in full in the record (R. 64-67). The allegations of that petition show that the decision in this case is of vital consequence to Bethlehem-Fairfield Shipyard, Incorporated, in connection with a suit now pending in the United States District Court for the District of Maryland. The decision below eliminated from that suit claims very large in amount, the defense of which would have imposed a very heavy burden on that company.

3. Counsel for both petitioner and respondent have filed with the Clerk of this Court their written consent to the granting of this motion.

WILLIAM L. MARBURY,
Counsel for Bethlehem-Fairfield Shipyard, Incorporated.

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CITATIONS

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, which appears in the record, pages 69-84, has not yet been officially reported. The opinion of the District Court, included in the record, pages 51-62, is reported in 68 F. Supp. 117.

STATEMENT OF CASE.

The *amicus curiae* concurs in respondent's Statement of the Case.

ARGUMENT.

On March 15, 1942, Judge ELI FRANK, sitting at nisi prius in the Baltimore City Court, held that a suit to recover overtime compensation, liquidated damages, fees and penalties under the Fair Labor Standards Act of 1938, 29 U. S. C. §201 *et seq.*, was an action on a "specialty" within the meaning of Section 3 of Article 57 of the CODE OF PUBLIC GENERAL LAWS OF MARYLAND and, hence, barred only after the expiration of twelve years. *Manhoff v. Thomsen-Ellis-Hutton Co.*, 6 Labor Cases 61,498 (not officially reported). Judge FRANK cited four decisions of the Court of Appeals of Maryland as controlling.

In the case at bar the Circuit Court of Appeals for the Fourth Circuit, after careful consideration of the identical decisions relied on by Judge FRANK, has reached the conclusion that they require a different result. Analyzing the reasoning of the Court of Appeals of Maryland, Judge MORRIS A. SOPER, himself a former Chief Judge of the Supreme Bench of Baltimore City, holds that the applicable statute of limitations is found in Section 1 of Article 57 of the CODE OF PUBLIC GENERAL LAWS OF MARYLAND and that actions under the Fair Labor Standards Act are consequently barred after three years.

The petitioners now ask this Court to inquire into this esoteric question of Maryland law.

I.

THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, (1940), this Court, speaking through Mr. Justice STONE, *said* (p. 238):

> "State law is to be applied in federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law'. * * *
>
> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

It is obvious, from even a cursory examination of the opinion of Judge SOPER, that the court below has not disregarded the *Manhoff* case but has, in pursuance of its duty to ascertain from all the available data what the state law is, become convinced by other persuasive data that the highest court of the state would decide otherwise. The opinion of Judge SOPER is explicit on this point. He says (R. p. 77):

> "We have reached the conclusion that it [Judge FRANK's decision] is not in accord with the rules announced in related cases by the Court of Appeals of Maryland, the highest court of the state."

Again he says (R. p. 78):

> "We realize, however, that our decision may not be based upon logical or historic considerations as they

> may appear to us but must be based rather on the Maryland rules as they had been evolved in the decisions of litigated cases in the Maryland courts; but we think that the application of these rules to the case at bar also supports the conclusion we have reached. We make reference particularly to four cases decided by the Court of Appeals of Maryland in the period between 1925 and 1941, to wit: *Mattare v. Cunningham*, 148 Md. 309, *Baltimore v. Finance Corp.*, 168 Md. 13, *Sterling v. Reecher*, 176 Md. 567, and *Insurance Commissioner v. Wachter*, 179 Md. 608."

Had the petitioner seen fit to bring this action in the state courts, the decision of Judge FRANK might have received exactly similar treatment at the hands of any of the judges who presently sit in the courts of Baltimore City. No decision of this Court requires from the Circuit Court of Appeals a deference to Judge FRANK which no Maryland judge is bound to show him.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

If this Court should feel called upon to determine whether Judge FRANK or Judge SOPER has correctly construed the decisions of the Court of Appeals of Maryland, we are confident that the result would be an affirmance of the decision below.

It would unduly extend this brief to analyze the four key decisions of the Court of Appeals of Maryland. For a full understanding of those decisions, it would be necessary to examine the history of the statute which has now been codified as Sections 1 and 3 of Article 57 of the CODE OF PUBLIC GENERAL LAWS OF MARYLAND and of its progenitor, the Act of 21 James I, Chapter 16, Section III. Here it is perhaps enough to point out that the Court of Appeals

of Maryland has generally followed the courts of England in the construction of this statute. Thus the decision in *Gutsell v. Reeve*, 52 T. L. R. 55 (1935), relied on below, is of special significance. There it was flatly held, construing the Act of James, that a suit for statutory minimum wages was not upon a specialty for the purpose of determining the applicable period of limitations.

In *Heyn v. Fidelity Trust Co.*, 174 Md. 639 (1938), the Court of Appeals of Maryland recently said (p. 658):

> "It is a sound and familiar principle of statutory construction that the meaning given to a statute by courts of the jurisdiction in which it was first enacted should be given great weight and where they are consistent with reason and sound logic may be accepted as controlling."

III.

THE DECISION BELOW IS LIMITED IN SCOPE AND LACKS THE IMPORTANCE JUSTIFYING REVIEW BY THIS COURT.

On May 14, 1947, the Portal-to-Portal Act of 1947, Public Law 49, 80th Congress, Chapter 52, First Session, became law. Section 6 of that Act reads as follows:

> "Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—
>
> "(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;
>
> "(b) if the cause of action accrued prior to the date of the enactment of this Act—may be com-

menced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

"(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations."

Thus it is apparent that the ruling of the court below on the question of limitations bears only on causes of action accruing prior to May 14, 1947. Even as to those causes of action, the application of the rule is limited by the provisions of Chapter 518 of the Acts of the General Assembly of Maryland of 1945. That statute expressly limited to three years the time within which suit might be brought under the Fair Labor Standards Act for unpaid minimum wages, unpaid overtime compensation, fees and penalties. The statute became effective on June 1, 1945, and applies not only to all causes of action accruing subsequent to that date but likewise to those causes of action accruing prior to that date on which suit was not filed within one year thereafter. If, as was held in *Swick v. Glenn L. Martin Co.*, 68 F. Supp. 863, aff. 160 F. 2d 483 (petition for certiorari now pending), the Act of 1945 is valid, then the decision in the case at bar will be of significance only in those few cases now pending in the District of Maryland where suit was filed under the Fair Labor Standards Act prior to June 1, 1946.

In this connection petitioner has seen fit to quote certain representations made by the undersigned to the Circuit Court of Appeals as to the effect of the application of the three year statute of limitations on certain suits under the Fair Labor Standards Act in which he appears as counsel for the defendant. In this petitioner appears to have fallen into the error of failing to distinguish between the public interest and the financial interest of particular litigants. The fact that the decision below has eliminated large claims from pending actions in which the undersigned appears as counsel, while of great importance to the undersigned and his clients, has no bearing on the importance of the question in the sense in which the word has always been construed by this Court in acting upon petitions for certiorari.

CONCLUSION.

In the last analysis the petitioner is asking this Court to intervene in a dispute between two able Maryland lawyers as to the true meaning of four decisions of the Court of Appeals of Maryland. Were this Court to respond favorably to such an invitation, it is respectfully submitted that it would find itself embarked on a work of supererogation.

Respectfully submitted,

WILLIAM L. MARBURY,
Counsel for Bethlehem-Fairfield Shipyard, Incorporated, Amicus Curiae.